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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

LEONEL ESPINOSA,

Defendant and Appellant.

2d Crim. No. B172037
(Super. Ct. No. BA235485)
(Los Angeles County)

Leonel Espinosa appeals a judgment after the court revoked his probation and imposed an upper term of five years in state prison, execution of which had been suspended. We conclude, among other things, that because Espinosa had earlier negotiated a plea agreement which provided for a five-year upper term: 1) he may not challenge his sentence and 2) the upper term sentence does not contravene his right to a jury trial under *Blakely v. Washington* (2004) ___U.S.___, [124 S.Ct. 2531]. We affirm.

FACTS

In 1998 Espinosa pled no contest to charges of possession for sale of cocaine base. (Health & Saf. Code, § 11351.5.) The court advised him, "You have constitutional rights . . . you have to waive . . . because there is not going to be a trial" It told him that by entering his plea he would waive the right to a "trial," a "jury

trial," to confront and cross-examine witnesses and to "put on your own defense."

Espinosa waived these rights and the court accepted his plea.

In imposing sentence it said, "pursuant to the agreement of the parties, the defendant is sentenced to the Department of Corrections for a period of five years, which is the high term. Execution of that sentence is suspended and the defendant is placed on formal probation"

Espinosa was later arrested for new offenses. In 2003 the court found that he violated his probation. It imposed the upper term of five years and said, "The high term is selected because it was the disposition agreed to in 1998."

DISCUSSION

I. Certificate of Probable Cause

Espinosa claims his upper term sentence is invalid because the court did not comply with *Blakely v. Washington, supra*, 124 S.Ct. 2531 before imposing sentence. The Attorney General contends that because Espinosa pled nolo contendere and agreed to a specific sentence he was required to obtain a certificate of probable cause to pursue this challenge on appeal. We agree. (*People v. Panizzon* (1996) 13 Cal.4th 68, 78.) But even on the merits the result is the same.

II. Blakely v. Washington

Espinosa contends that the court erred by imposing the upper five-year term without: 1) advising him of his right to a jury trial on aggravating sentencing factors (*Blakely v. Washington, supra*, 124 S.Ct. 2531) and 2) by not obtaining his waiver of that right. We disagree.

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) In *Blakely* the Supreme Court held that a defendant who pled guilty had the right to a jury trial where the imposition of a higher sentence required additional fact finding. It said, "the judge's authority to sentence derives wholly from the jury's verdict. Without that

restriction, the jury would not exercise the control that the Framers intended." (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2539.)

Espinosa notes that Penal Code section 1170, subdivision (b) provides, "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." He claims that under *Blakely* a jury must decide the aggravating factors to support an upper term sentence. But consistent with *Blakely* a defendant may waive the right to jury findings or otherwise eliminate the need for them. That is what happened here. The trial court advised Espinosa about his right to a jury trial, but he waived it. There were no facts for a judge or jury to decide. There were no findings required for an upper term because Espinosa negotiated for that specific sentence. "[W]here, as here, a defendant agrees to a particular sentence as part of a plea bargain, a separate adversary hearing is unnecessary and the prosecution need not meet the traditional burden of proof in order to determine the proper penalty to be imposed." (*People v. Panizzon, supra*, 13 Cal.4th at p. 79.)

The Attorney General argues that because Espinosa agreed to a specific sentence, he waived his right to challenge it. (*People v. Hester* (2000) 22 Cal.4th 290, 295.) "Where the defendants have pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process." (*Ibid.*) "'When a defendant maintains that the trial court's sentence violates rules which would have required the imposition of a more lenient sentence, yet the defendant avoided a potentially harsher sentence by entering into the plea bargain, it may be implied that the defendant waived any rights under such rules by choosing to accept the plea bargain.'" (*Ibid.*)

Here Espinosa received the sentence for which he bargained. He does not claim that the plea bargain was not beneficial or that it was involuntary. Nor has he

shown how findings are relevant where he requested the court to impose the upper term. He claims the trial court did not give the proper advisements under *Blakely*, but has failed to show prejudicial error. He has not demonstrated that he "' . . . would not have entered the plea . . . had the trial court given a proper advisement.'" (*People v. Avila* (1994) 24 Cal.App.4th 1455, 1459-1460.)

The judgment is affirmed.

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GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Anita Dymant, Judge
Superior Court County of Los Angeles

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster, Supervising Deputy Attorney General, Chung L. Mar, Deputy Attorney General, for Plaintiff and Respondent.